Supreme Court, U.S.

No. 981554 FEB 13 1999

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1998

THE BOARD OF REGENTS OF NEW MEXICO STATE UNIVERSITY AND JIM PAUL,

Petitioners,

vs.

FLETCHER COCKRELL,

Respondent.

On Petition For Writ Of Certiorari To Supreme Court Of The State Of New Mexico

PETITION FOR WRIT OF CERTIORARI

SANDENAW, CARRILLO & PIAZZA, P.C.
THOMAS A. SANDENAW, JR.
LEONARD J. PIAZZA*
2951 A Roadrunner Parkway
Las Cruces, New Mexico 88011
(505) 522-7500

CHRISTINE CHAVEZ KELLEY
Assistant to the President, NMSU
New Mexico State University
Hadley Hall – Room 120
MSC 3ATP
Post Office Box 30001
Las Cruces, New Mexico
88003-8001
(505) 646-3244

**Counsel of Record for Petitioners*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

QUESTION I:

Whether Congress acting pursuant to the Commerce Clause, U.S. Const., art. I, § 8, has the power to force the States to submit to unconsented Fair Labor Standards Act, 29 U.S.C § 201 *et seq.* damages suits in the States' own courts.

QUESTION II:

Whether the common law and statutory immunity possessed by the State of New Mexico immunizes the State from Fair Labor Standards Act suit in state court to the same degree that the Eleventh Amendment immunizes the State from Fair Labor Standards Act suit in the federal courts.

QUESTION III:

Whether the requirements of the Supremacy Clause, that state courts enforce federal law, are triggered when the congressional abrogation of the States' sovereign immunity to suit contained in the Fair Labor Standards Act is an invalid exercise of the Commerce Clause power.

QUESTION IV:

Whether the Supremacy Clause requires the state courts to adjudicate Fair Labor Standards Act claims against the States despite the fact that the State has specifically refused to waive its immunity to analogous state statutory actions.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners, Defendants – Appellants below are the Board of Regents of New Mexico State University and Jim Paul.

Respondent, Plaintiff – Appellee below is Fletcher Cockrell.

TABLE OF CONTENTS

Page

Questions Presented for Review i

Parties to the Proceedings Below ii

Table of Contents..... iii

Table of Authorities v

Petition for Writ of Certiorari..... 1

Opinions Below 1

Jurisdiction..... 1

Rule 29.4(b) Certification 1

Constitutional and Statutory Provisions Involved... 2

Statement of the Case 4

Reasons for Granting the Writ..... 7

I. The Court should grant the petition to resolve a conflict among state courts regarding the question of Congress' power to abrogate the states' sovereign immunity to uncontested FLSA suits in state courts..... 7

II. The Court should grant the petition to correct the New Mexico Court of Appeals' erroneous application of the Supremacy Clause to deny New Mexico the sovereign immunity to which it is entitled in its own courts..... 15

Conclusion 18

Appendix A Opinion of the Court of Appeals of the State of New Mexico, October 5, 1998.....App. 1

Appendix B Order of the Third Judicial District Court, County of Dona Ana, State of New Mexico, March 31, 1998.....App. 4

TABLE OF CONTENTS – Continued

Page

Appendix C Order of the Supreme Court of New Mexico Denying Petition for *writ of certiorari*, November 19, 1998 ..... App. 7

TABLE OF AUTHORITIES

Page

CASES

Aaron v. State of Kansas, 115 F.3d 813 (10th Cir. 1997) 9

Alden v. Maine, 1998 ME 200, 715 A.2d 172 (1998) 7, 9, 10, 13

Allen v. Fauver, No. ESX-L-3302-94 (N.J. Super. Ct., February 17, 1998) 13

Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991) 13

Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 (1979) 15

Douglas v. New York, N.H. & H.R. Co., 279 U.S. 377 (1929) 17

Employees v. Missouri Public Health Dept., 411 U.S. 279 (1973) 11

German v. Wisconsin Dep't of Transportation, No. 96-CV-1261 (Wis.Circuit Court, March 8, 1997, *aff'd on other grounds*, 1998 WL 834153 (Wis.App. 1998)) 13

Hans v. Louisiana, 134 U.S. 1 (1890) 13, 14

Herb v. Pitcairn, 324 U.S. 117 (1945) 16

Howlett v. Rose, 496 U.S. 356 (1990) 17

Jacoby, et al. v. Arkansas Dept. of Education, 331 Ark. 508, 962 S.W.2d 773 (1998) 7, 10

Keller v. Dailey, 1997 WL 781897 (Ohio App. Dist., December 16, 1997) 13

Moad v. Arkansas State Police Dept., 111 F.3d 585 (8th Cir. 1997) 9

TABLE OF AUTHORITIES – Continued

Page

Mondou v. New York, New Haven & Hartford Railroad Co., 223 U.S. 1 (1912) 15

Parden v. Terminal Railway of Alabama, 377 U.S. 184 (1964) 12

Pennsylvania v. Union Gas, 491 U.S. 1 (1989) 8

Principality of Monaco v. Mississippi, 292 U.S. 313 (1934) 9

Printz v. United States, 117 S.Ct. 2365 (1997) 16

Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 501 U.S. 139 (1993) 13

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) 8, 9, 10, 12, 13, 14

Wilson-Jones v. Caviness, 99 F.3d 203 (6th Cir. 1996) 9

CONSTITUTIONAL PROVISIONS

U.S. Constitution, Article I, Section 8 .....2, 8

U.S. Constitution, Article VI, clause 2.....2, 15

U.S. Constitution, Amendment XI.....2, 8, 10, 12, 13

FEDERAL STATUTES

Fair Labor Standards Act

29 U.S.C. § 201 *et seq.* 5

29 U.S.C. § 207 2

29 U.S.C. § 216(b) 3, 11, 16

29 U.S.C. § 216(c) 3, 11

TABLE OF AUTHORITIES – Continued

Page

Indian Gaming Regulatory Act

25 U.S.C. §§ 2701-2721 8

New Mexico Statutes

NMSA 1978, § 50-4-21 ..... 4, 17

NMSA 1978, § 50-4-22 4

PETITION FOR WRIT OF CERTIORARI

The Board of Regents of New Mexico State University, et al. – the defendants in the trial court and the appellants in the court below – respectfully petition for a *writ of certiorari* to review the decision of the New Mexico Court of Appeals in this case.

OPINIONS BELOW

The decision of the New Mexico Court of Appeals in *Cockrell v. The Board of Regents of New Mexico State University, et al.*, No. 19,346 (Ct.App. 1998), *cert. denied*, No. 25,431 (Nov. 19, 1998) is reprinted in its entirety in Appendix A. The Order of the district court for the Third Judicial District, County of Dona Ana, State of New Mexico, is reprinted in Appendix B. The order of the New Mexico Supreme Court denying defendants-appellants' petition for *certiorari* is unreported and is reprinted in Appendix C.

JURISDICTION

The New Mexico Supreme Court entered its order denying *certiorari* on November 19, 1998. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

RULE 29.4(b) CERTIFICATION

Since 28 U.S.C. § 2403(a) may apply and the United States is not a party to this matter, copies of this *certiorari*

petition are being served on the Solicitor General of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 8 of the United States Constitution provides, in pertinent part:

> [T]he Congress shall have power . . . to regulate Commerce . . . among the several States.

* * * *

Article VI, Clause 2 of the United States Constitution provides, in pertinent part:

> This Constitution and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

* * * *

The Eleventh Amendment to the United States Constitution provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

* * * *

The Fair Labor Standards Act at 29 U.S.C. § 207 states in pertinent part:

> (a) employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions
>
> > (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any work week is engaged in commerce or in the production of goods for commerce or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a work week longer than 40 hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one-and-one-half times the regular rate at which he is employed.

The Fair Labor Standards Act at 29 U.S.C. § 216(b) provides, in pertinent part:

> Any employer who violates the provisions of [29 U.S.C] Section 206 or Section 207 . . . shall be liable to the employee or employees affected in the amount of their . . . unpaid overtime compensation . . . and in an additional equal amount as liquidated damages. . . . An action to recover the liability prescribed . . . may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.

The Fair Labor Standards Act at 29 U.S.C. § 216(c) provides in pertinent part:

> The Secretary [of Labor] may bring an action in any court of competent jurisdiction to recover

> the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages.
>
> * * * *

New Mexico Statutes Annotated, Chapter 50 (Michie) at § 50-4-22 ("the Minimum Wage Act") provides in pertinent part:

> C. No employee covered by the provisions of Subsection A of this section shall be required to work more than forty hours in any week of seven days, unless he is paid one-and-one-half times his regular hourly rate of pay for all hours worked in excess of forty hours.

New Mexico Statutes Annotated, Chapter 50 (Michie) at § 50-4-21 provides in pertinent part:

> As used in the Minimum Wage Act . . .
>
> B. "employer" includes any individual, partnership, association, corporation, . . . employing one or more employees . . . but shall not include the United States, the state or any political subdivision thereof . . .

STATEMENT OF THE CASE

Petitioner, the Board of Regents of New Mexico State University, (hereinafter, "NMSU"), is an arm of the State of New Mexico which employs state employees. Petitioner Jim Paul is the Athletic Director for NMSU. NMSU and Mr. Paul are referenced hereinafter as "Petitioners".

Respondent Fletcher Cockrell is a former Assistant Men's Basketball Coach for NMSU.

On December 23, 1997, Fletcher Cockrell (hereinafter, "Respondent"), initiated litigation in the Third Judicial District Court, County of Dona Ana, State of New Mexico, by filing a Complaint for (1) violation of civil rights, and (2) failure to pay overtime compensation.[1] The portion of the complaint relevant to this petition involves respondent's claim for unpaid overtime, liquidated damages and attorney's fees stemming from NMSU's alleged violation of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 *et seq.*

Petitioners moved to dismiss the overtime component of the Complaint on the grounds that the State of New Mexico, as a sovereign entity, is immune from FLSA suit by private litigants without the consent of the State legislature and that Congress has no authority, under the Commerce Clause, to override the State's immunity to suit.

On March 31, 1998, the New Mexico state district court denied the Petitioners' motion to dismiss for lack of subject matter jurisdiction. The unpublished district court Order embodying this decision is attached as Appendix B. Although the Order denied Petitioners' motion to dismiss the FLSA claims, the Order contained language necessary for Petitioners to seek interlocutory appeal on the

---

[1] Respondent's amended Complaint also asserts a breech of contract claim. All proceedings in the district court are currently stayed pending resolution of appellate issues relating to the civil rights and FLSA claims.

following issue: "[w]hether [the trial court] has subject matter jurisdiction over Plaintiff's private FLSA claim for the payment of overtime wages." (Appendix B).

On April 14, 1998, Petitioners timely submitted an application for interlocutory appeal from the denial of the Motion to Dismiss the Fair Labor Standards Act claim to the New Mexico Court of Appeals. By Order dated May 20, 1998, the New Mexico Court of Appeals granted Petitioners' application for leave to file an interlocutory appeal on the FLSA issue.

Thereafter, Petitioners appealed the trial court's denial of their motion to dismiss Respondent's FLSA claim to the Court of Appeals. On October 5, 1998, a three-judge panel of the New Mexico Court of Appeals unanimously affirmed the trial court's denial of Petitioners' Motion to Dismiss Respondent's FLSA claims. (Appendix A). The New Mexico Court of Appeals Memorandum Opinion states as follows:

> Employers moved to dismiss Cockrell's claim based on, among other things, the United States Supreme Court's ruling in *Seminole Tribe v. Florida*, 517 U.S. 44, 61-66 (1996). Employers asserted that the holding in *Seminole* prevented the district court from addressing FLSA claims. The district court denied the Employers' motion. On April 14, 1998, Employers filed an Application for Interlocutory Appeal on the jurisdictional issue. We granted the Interlocutory Appeal.
>
> On appeal, Employers ask us to decide "whether state trial courts in New Mexico have subject matter jurisdiction over private FLSA overtime claims brought against state employers.

> In *Whittington v. State of New Mexico Dep't of Pub. Safety*, No. 19,065, slip op. at ¶¶ 11-15 (N.M. Ct. App. Sept. 3, 1998), we held that neither the Eleventh Amendment nor state sovereign immunity bars suit against the State for FLSA violations in state court. We find the jurisdictional issue decided in *Whittington* indistinguishable for the jurisdictional issue raised in the present case and therefore *Whittington* controls.[2]

(Appendix B).

On October 23, 1998, Petitioners filed a timely petition for Certiorari which was denied by the New Mexico Supreme Court on November 19, 1998 (Appendix C).

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THE PETITION TO RESOLVE A CONFLICT AMONG STATE COURTS REGARDING THE QUESTION OF CONGRESS' POWER TO ABROGATE THE STATES' SOVEREIGN IMMUNITY TO UNCONSENTED FLSA SUITS IN STATE COURTS

On November 9, 1998, this Court granted *certiorari* in *Alden v. Maine*, 1998 ME 200, 715 A.2d 172 (1998), a case raising the identical questions raised by this petition and the pending petition in *Whittington. Jacoby, et al. v. Arkansas Dept. of Education*, 331 Ark. 508, 962 S.W.2d 773 (1998) *sub. nom. Arkansas Department of Education v. Jacoby,*

---

[2] A petition for Writ of Certiorari in the *Whittington* case is also pending before the United States Supreme Court.

et al. (No. 98-04) also involves this same issue. The cases from Maine, Arkansas and New Mexico are only the first of a barrage of cases from the state courts determining the question of whether federal statutes passed under Congress' Commerce Clause power can require the state courts to hear claims against unconsenting States. The question flows inevitably from this Court's Commerce Clause analysis and decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). *Seminole Tribe* held that the Indian Commerce Clause, art. I, § 8, cl. 3, did not empower Congress to abrogate Florida's Eleventh Amendment immunity to unconsented suit by its enactment of the Indian Gaming Regulatory Act, 25 U.S.C.A. §§ 2701-2721 (West 1983 & Supp.1998) ("IGRA").

Seminole Tribe expressly overruled *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989), the "only" case where "congressional abrogation of the State's Eleventh Amendment immunity" had been upheld. *Seminole*, 517 U.S. at 59 (Justice Souter dissenting). In overruling *Pennsylvania v. Union Gas*, the Court "reconfirm[ed] the background principle of state sovereign immunity embodied in the Eleventh Amendment . . . " *Id.* at 71-72 (footnote omitted).

The Tribe's position, based on *Union Gas*, that the States ceded their sovereignty to the federal government when they ratified the Constitution and granted Congress plenary power to regulate interstate commerce, was soundly repudiated:

> Manifestly, we cannot rest with the mere literal application of the words of § 2 of art. III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting states. Behind the words

> of the constitutional provisions are postulates which limit and control. . . . There is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a 'surrender of this immunity in the plan of the convention.'

Seminole Tribe of Florida v. Florida, 517 U.S. at 68 (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 321-323 (1934) (Chief Justice Hughes)).

In response to *Seminole Tribe*, the lower federal courts dismissed a number of private FLSA suits pending against the States for lack of subject matter jurisdiction. *See, e.g., Aaron v. State of Kansas*, 115 F.3d 813 (10th Cir. 1997); *Moad v. Arkansas State Police Dept.*, 111 F.3d 585 (8th Cir. 1997): *Wilson-Jones v. Caviness*, 99 F.3d 203 (6th Cir. 1996). While there was dicta in a few of these decisions stating that plaintiffs would still be free to file their FLSA claims against States in the state courts,[3] the issue of congressional power to negate the States' sovereign immunity in the States' own courts has not been decided, as it must be, by this Court.

In *Alden*, the Maine Supreme Judicial Court ruled that Congress' Commerce Clause power was insufficient to require the state courts to adjudicate private FLSA

---

[3] *See, e.g., Aaron v. State of Kansas*, 115 F.3d 813, 817 (10th Cir. 1997) ("[T]he employee can sue in state court for money damages under the FLSA as a state court of general jurisdiction is obligated by the Supremacy Clause to enforce federal law.").

claims against the State. The Maine court noted the inapplicability of the Eleventh Amendment in state court and held:

> [I]t is clear that we have looked to the Eleventh Amendment to define the contours of state sovereign immunity. If Congress cannot force the states to defend in federal courts against claims by private individuals, it similarly cannot force the states to defend in their own courts against these same claims. In reaching this conclusion, we have found that the Eleventh Amendment and state sovereign immunity are analogous, to the extent that both protect the State from being forced by an act of Congress to defend against a federal cause of action brought by a private individual. To hold otherwise, by concluding that a state, immune from suit in federal court, must defend against the same suit in its own courts, would effectively vitiate the Eleventh Amendment.

Alden v. State of Maine, 715 A.2d at 174.

The Supreme Court of Arkansas, while acknowledging the state constitutional immunity afforded Arkansas in its own courts, held that the Supremacy Clause prohibited unconsenting States from asserting sovereign immunity to FLSA suit in their own courts.

In reviewing the trial court's grant of dismissal, the Arkansas court relied on the same "plan of the Constitution" surrender explicitly rejected by this Court in *Seminole Tribe*. *See Jacoby v. Arkansas*, 962 S.W.2d at 777 ("[B]y empowering Congress to regulate commerce, the states necessarily surrendered 'any portion of their sovereignty

that would stand in the way of such regulation.' "), quoting *Employees v. Missouri Public Health Dept.*, 411 U.S. 279, 288-89 (1973).

Like Arkansas, the New Mexico appellate court, in overruling the trial court, relied solely on the Supremacy Clause. The New Mexico court did not deny that the State's sovereign immunity afforded the State protection from unconsented suit but chose not to address the issue of *Seminole Tribe's* limitations on Congress' Commerce Clause power in the state court context. The court concluded only that the Supremacy Clause required the state courts to remain open to FLSA suits brought by individuals despite the fact that the States are immune from these same suits in federal court. (*See* Appendix A to Petitioners' Petition for Writ of Certiorari in *Whittington*.)

The Fair Labor Standards Act requires private and public employees to comply with federal minimum wage and overtime requirements. The statute allows for enforcement by private individuals in federal or state court, *see* 29 U.S.C. § 216(b) and by the Secretary of Labor. *See* 29 U.S.C. § 216(c). The questions raised by the State FLSA cases do not affect the Secretary's ability to sue the States. In fact, in *Employees v. Missouri Public Health Dept.*, 411 U.S. 279 (1973), Justice Douglas, after concluding that the Act, as then written, did not sufficiently demonstrate congressional intent to abrogate the States' immunity to suit, noted:

> In this connection, it is not amiss to note that s. 16(b) [29 U.S.C. § 216(b)] allows recovery by employees, not only of the amount of unpaid wages, but of an equal amount as liquidated damages and attorneys fees. It is one thing, as in

> *Parden, [Parden v. Terminal Railway of Alabama State Docks Dept.*, 377 U.S. 184 (1964)], to make a state employee whole; it is quite another to let him recover double against a state. Recalcitrant private employers may be whipped into line in that manner. We are reluctant to believe that Congress, in pursuit of a harmonious federalism, desired to treat the States so harshly. The policy of the Act so far as the States are concerned is wholly served by allowing the delicate federal-state relationship to be managed through the Secretary of Labor.

411 U.S. at 286; *see also Seminole*, 517 U.S. at 71, fn. 14.

Employees suing the States for FLSA violations in state courts seek to narrowly construe *Seminole Tribe* as an Eleventh Amendment case without application to the state courts. The *Seminole Tribe* majority, however, relied on well-established principles of sovereign immunity of which the Eleventh Amendment is but one exemplification. The States' common law sovereign immunity is the "constitutional postulate" that is embodied in the Eleventh Amendment. *Seminole Tribe*, 517 U.S. at 88. The Eleventh Amendment does not delimit the scope and effect of state sovereign immunity. Rather it reflects but one aspect of the State's inherent, more sweeping immunity from suits brought by private parties. It is standing sovereign immunity on its head to assert that it protects the States in its successor Eleventh Amendment form in federal courts but fades to impotence when asserted in its original stronghold, the state courts.

Seminole's sovereign immunity analysis went far beyond the effect of the Eleventh Amendment on the jurisdiction of Article III courts. Indeed, the Court stated

that the Eleventh Amendment "[s]tands not so much for what is says, but for the presupposition . . . which it confirms." *Seminole Tribe*, 517 U.S. at 54 (quoting from *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991)) " . . . that each State is a sovereign entity in our federal system; and second, that '[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.' " *Seminole Tribe*, 517 U.S. at 54 (quoting from *Hans v. Louisiana*, 134 U.S. 1, 13 (1890)).

The State's sovereign immunity to suit in any court pre-exists and informs the Eleventh Amendment. *Seminole Tribe*, 517 U.S. at 54 (quoting *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 501 U.S. 139, 146 (1993)) ("The amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity"). *Seminole's* reaffirmation of the dual sovereignty of the States and its recognition of the vitality of the States' sovereign immunity outside of the Eleventh Amendment context, led directly to the numerous trial court dismissals of FLSA claims against the States in state courts. *See Keller v. Dailey*, 1997 WL 781897 (Ohio App. 10 Dist., December 16, 1997) (sovereign immunity bars state-court action for money damages under the FLSA in state court of general jurisdiction; proper forum was state Court of Claims); *German v. Wisconsin Dep't of Transportation*, No. 96-CV-1261 (Wis. Circuit Court, March 8, 1997, *aff'd on other grounds* 1998 WL 834153 (Wis.App. 1998); *Alden v. State of Maine*, 1998 ME 200, 715 A.2d 172 (1998); *Allen v. Fauver*, No. ESX-L-3302-94 (N.J. Super. Ct., February 17, 1998)).

The New Mexico and Arkansas appellate courts ignored or reasoned away *Seminole Tribe's* forthright reinvigoration of the States' sovereign immunity and held that private FLSA claims against the States, this "new and strange jurisdiction"[4] could go forward in state courts despite the States' immunity to unconsented suit. Maine remained faithful to the constitutional status of State sovereign immunity elucidated in *Seminole Tribe*. This

---

[4] *Hans v. Louisiana*, 134 U.S. 1 (1890), a case much discussed in *Seminole Tribe*, analyzed the States' pre-existing common law sovereign immunity as the constitutional basis for the Eleventh Amendment's prohibition of actions brought by citizens against their own States. In its analysis of the jurisdictional grant to the federal courts under the Judiciary Act, the Court stated:

> But besides the presumption that no anomalous and unheard-of proceedings or suits were intended to be raised up by the Constitution – anomalous and unheard-of when the Constitution was adopted – an additional reason why the jurisdiction claimed for the circuit court [over Louisiana] does not exist is the language of the act of Congress by which its jurisdiction is conferred. The words are these: The circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, . . . arising under the Constitution or laws of the United States, or treaties, etc. – "Concurrent with the Courts of the several states." Does not this qualification show that Congress, in legislating to carry the Constitution into effect, did not intend to invest its courts with any new and strange jurisdictions? *The state courts have no power to entertain suits by individuals against the State without its consent.* Then how does the circuit court having only concurrent jurisdiction acquire any such power?

Hans v. Louisiana, 134 U.S. at 18 [emphasis added].

conflict should be resolved in favor of a "harmonious federalism" that respects the State's immunity in its own courts.

II. THE COURT SHOULD GRANT THE PETITION TO CORRECT THE NEW MEXICO COURT OF APPEALS' ERRONEOUS APPLICATION OF THE SUPREMACY CLAUSE TO DENY THE STATE THE SOVEREIGN IMMUNITY TO WHICH IT IS ENTITLED IN ITS OWN COURTS

The Supremacy Clause provides:

> This Constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and Judges in every state shall be bound thereby, anything in the Constitution or the laws of the states to the contrary notwithstanding.

Under the Supremacy Clause, U.S. Const. Article VI, States have the coordinate authority and consequent responsibility to enforce the supreme law of the land in their courts "when their jurisdiction, as prescribed by local laws, is adequate to the occasion." *Mondou v. New York, New Haven & Hartford Railroad Company,* 223 U.S. 1, 59 (1912).

The Supremacy Clause confers no power on Congress, *Chapman v. Houston Welfare Rights Organization,* 441 U.S. 600 (1979), and cannot remedy an invalid exercise of Commerce Clause power. Because Congress lacks the constitutional power to abrogate the States' immunity to

suit in the FLSA, § 216(b) of the Act is *ultra vires* and there is no "supreme" law to enforce.

In *Printz v. United States*, 117 S.Ct. 2365 (1997), the Supreme Court rejected a similar Supremacy Clause argument advanced by proponents of the "Brady Bill." *Printz* held the gun control legislation unconstitutional because it impinged on the State's sovereign immunity by requiring state officials to conduct background checks under federal law. In rejecting the proponents' Supremacy Clause argument, the Court stated:

> The Supremacy Clause, however, makes "Law of the Land" only "Laws of the United States which shall be made in Pursuance [of the Constitution]"; so the Supremacy Clause merely brings us back to the question discussed earlier, whether laws conscripting state officers violate state sovereignty and are thus not in accord with the Constitution.

Printz, 117 S.Ct. at 2365, 2379.

When Congress purported to abrogate the States' immunity to FLSA suit in the States' own courts, it overstepped its Commerce Clause power. To this extent, 29 U.S.C.A. § 216(b) violates the Constitution. Congress' unconstitutional exercise of its Commerce Clause power cannot be redeemed by resort to the Supremacy Clause.

Even if it were applicable to the FLSA cases, the Supremacy Clause does not require a State to take jurisdiction over a federal cause of action when a neutral nondiscriminatory reason exists for declining jurisdiction. *See Herb v. Pitcairn*, 324 U.S. 117 (1945). "The requirements that a state court . . . treat federal law as the law of the

land does not . . . include within it a requirement that the State create a court competent to hear the case in which the federal claim is presented." *Howlett v. Rose*, 496 U.S. 356, 372 (1990).

The Supremacy Clause does not allow Congress to redefine the state court's existing jurisdiction and procedure to create a state forum for federal rights where none exists. When the subject matter of an action is not within the state court's jurisdiction, the state court's refusal to enforce a federal right is not a violation of the Supremacy Clause. *Douglas v. New York, N.H. & H.R. Co.*, 279 U.S. 377 (1929).

New Mexico's sovereign immunity defense does not discriminate against a federal right prohibited by the Supremacy Clause. New Mexico trial courts do not "otherwise" have jurisdiction of wage and hour claims against the State of New Mexico under state law. The only "like matter" to a FLSA claim in New Mexico, a statutory cause of action under the Minimum Wage Act, specifically exempts the State from suit. NMSA 1978, § 50-4-21 (1993). The sort of "discrimination" discussed and rejected in the Supremacy Clause cases occurs when the state court rejects the policy of the federal act or seeks to avoid crowding the state court's calendars. *See Howlett v. Rose*, 496 U.S. 356, 379 (1990). The courts of this State do not hear or adjudicate any state wage and hour claims against the State.

The Supremacy Clause does not require the state courts to adjudicate all federal claims against unconsenting States. It cannot supply Congress with the power to abrogate the State's sovereign immunity nor can it

require the State to submit to claims for which it is not otherwise liable under state law.

CONCLUSION

For the foregoing reasons, certiorari should be issued to the Court of Appeals of the State of New Mexico so that this honorable Court may review and correct the decision below, and resolve the split among state courts on the question of a State's right to refuse to allow itself to be sued for FLSA claims by private individuals in the State's own courts.

Respectfully submitted,

SANDENAW, CARRILLO
& PIAZZA, P.C.
THOMAS A. SANDENAW, JR.
LEONARD J. PIAZZA*
2951 A Roadrunner Parkway
Las Cruces, New Mexico 88011
(505) 522-7500

CHRISTINE CHAVEZ KELLEY
Assistant to the President, NMSU
New Mexico State University
Hadley Hall – Room 120
MSC 3ATP
Post Office Box 30001
Las Cruces, New Mexico
88003-8001
(505) 646-3244

Counsel of Record for Petitioners

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

FLETCHER COCKRELL,

Plaintiff-Appellee,

vs. **No. 19,346**

THE BOARD OF REGENTS OF NEW MEXICO STATE UNIVERSITY and JIM PAUL,

Defendants-Appellants.

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY
Robert E. Robles, District Judge

MATTHEW P. HOLT
Holt & Babington, P.C.
Las Cruces, New Mexico — Attorney for Appellee

THOMAS A. SANDENAW, Jr.
LEONARD J. PIAZZA
Law Office of T.A. Sandenaw
Las Cruces, New Mexico

CLIFFORD K. ATKINSON
Atkinson & Thal, P.C.
Albuquerque, New Mexico

KENNETH L. HARRIGAN
Modrall, Sperling, Roehl,
Harris & Sisk, P.A.
Albuquerque, New Mexico

CHRISTINA CHAVEZ KELLEY
NM State University
Las Cruces, New Mexico — Attorneys for Appellants

MEMORANDUM OPINION

(Filed Oct. 5, 1998)

ALARID, Judge.

The Board of Regents of New Mexico State University and Jim Paul (Employers) assert that the district court erred in denying their motion to dismiss for want of jurisdiction in Feltcher Cockrell's (Cockrell) suit against Employers. The district court found that the Eleventh Amendment did not grant sovereign immunity to the State in state court. We affirm.

On December 23, 1997, Cockrell filed suit against Employers for violations of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219 (1978). Employers moved to dismiss Cockrell's claim based on, among other things, the United States Supreme Court's ruling in *Seminole Tribe v. Florida*, 517 U.S. 44, 61-66 (1996). Employers asserted that the holding in *Seminole* prevented the district court from addressing FLSA claims. The district court denied the Employers' motion. On April 14, 1998, Employers filed an Application for Interlocutory Appeal on the jurisdictional issue. We granted the Interlocutory Appeal.

On appeal, Employees ask us to decide "whether state trial courts in New Mexico have subject matter jurisdiction over private FLSA overtime claims brought against state employers."

DISCUSSION

In *Whittington v. State of New Mexico Dep't of Pub. Safety*, No. 19,065, slip op. at ¶¶ 11-15 (N.M. Ct. App.

Sept. 3, 1998), we held that neither the Eleventh Amendment nor state sovereign immunity bars suit against the State for FLSA violations in state court. We find the jurisdictional issue decided in *Whittington* indistinguishable from the jurisdictional issue raised in the present case and therefore *Whittington* controls.

CONCLUSION

We hold that state trial courts do have jurisdiction over private FLSA claims. We, therefore, affirm the decision of the district court denying the Employers' motion to dismiss and remand for proceedings consistent with this opinion and with *Whittington*.

IS SO ORDERED.

/s/ A. Joseph Alarid
A. JOSEPH ALARID, Judge

WE CONCUR:

/s/ Harris L. Hartz
HARRIS L HARTZ, Chief Judge

/s/ Michael D. Bustamante
MICHAEL D. BUSTAMANTE, Judge

APPENDIX B

THIRD JUDICIAL DISTRICT COURT
COUNTY OF DONA ANA
STATE OF NEW MEXICO

FLETCHER COCKRELL,

Plaintiff,

vs.

THE BOARD OF REGENTS OF NEW MEXICO STATE UNIVERSITY and JIM PAUL,

Defendants.

NO. CV-97-2385

JUDGE
ROBERT E. ROBLES

ORDER

(Filed '98 Mar. 31)

THIS MATTER came before the Court on February 23, 1998 on Defendants' Motion to Dismiss. Having reviewed the Motion and the briefs of the Parties, having heard oral argument from the Parties' respective counsel, the Court finds that Defendants' Motion to Dismiss is not well-taken and will be denied. The Court further finds that the denial of Defendants' Motion to Dismiss Plaintiff's Fair Labor Standards Act ("FLSA") claim, arguing that this Court lacks subject matter jurisdiction, involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal from this Order may materially advance the ultimate termination of this litigation.

The Court also finds the Defendants' Motion to Strike the affidavits' of Al Gonzales, Tom Vincent, Dorothy Peters and Portions of the Affidavit of Plaintiff is not well taken, and will be denied as moot, because the Court determined that Mr. Paul is not entitled to the defense of qualified immunity as a question of law, and did not rely on these Affidavits in making its decision.

IT IS THEREFORE ORDERED that Defendants Motion to Dismiss is hereby denied. This Court hereby certifies that the following issue presented in Defendants' Motion to Dismiss presents a controlling question of law as to which there is substantial ground for a difference of opinion and that an immediate appeal from this decision may materially advance the ultimate termination of this litigation:

> Whether this Court has subject matter jurisdiction over Plaintiff's private FLSA claim for the payment of overtime wages.

IT IS FURTHER ORDERED that Defendants' Motion to Strike Affidavits of Al Gonzales, Tom Vincent, Dorothy Peters and Portions of the Affidavit of Plaintiff is hereby denied as moot. The Court did not consider the evidence which Defendants objected to in the Motion to Strike in determining, as a matter of law, whether Mr. Paul was entitled to the defense of qualified immunity.

IT IS FURTHER ORDERED that since Plaintiff has withdrawn his claims under the State Minimum Wage and Overtime Act, the Court thereby dismisses this claim with prejudice.

IT IS FURTHER ORDERED that the Board of Regents' Motion to Dismiss claims against it for monetary damages under 42 U.S.C. § 1983 is hereby granted.

/s/ Robert E. Robles
Honorable Robert E. Robles

Respectfully Prepared and Submitted,

LAW OFFICE OF T.A. SANDENAW

/s/ Leonard J. Piazza
Thomas A. Sandenaw, Jr.
Leonard J. Piazza
2951 A Roadrunner Parkway
Las Cruces, New Mexico 88011
(505) 522-7500
Attorneys for Defendants

Approved By:

HOLT & BABINGTON

/s/ Matthew P. Holt
Matthew P. Holt
201 N. Church St.
Suite 300
P. O. Box 2699
Las Cruces, NM 88004-2699

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
Thursday, November 19, 1998

NO. 25,431

FLETCHER COCKRELL,

Plaintiff-Respondents,

vs.

THE BOARD OF REGENTS OF NEW MEXICO STATE UNIVERSITY AND JIM PAUL,

Defendants-Petitioners.

ORDER

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition, and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that petition for writ of certiorari is **denied** in Court of Appeals number 19346.

ATTEST: A True Copy

KATHLEEN JO GIBSON
CLERK OF THE SUPREME COURT

By /s/ Jane Gurulè
Chief Deputy

Supreme Court, U.S.
FILED
MAY 24 1999
CLERK

No. 98-1554

IN THE

Supreme Court of the United States

BOARD OF REGENTS OF THE NEW MEXICO STATE UNIVERSITY and JIM PAUL,

Petitioners,

v.

FLETCHER COCKRELL,

Respondent.

On Petition for a Writ of Certiorari to the New Mexico Court of Appeals

MEMORANDUM FOR RESPONDENT

MATTHEW HOLT
Counsel of Record
HOLT & BABINGTON, P.C.
Attorneys for Respondent
1660 Hickory Loop
Las Cruces, NM 88005
(505) 524-8812

153101

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

3rd

MEMORANDUM FOR RESPONDENT

The Respondent, Fletcher Cockrell, does not oppose the grant of certiorari sought by the Board of Regents of New Mexico State University and Jim Paul, the Petitioners. The Petition (at pages 4 through 7) fairly states the procedural history and nature of the case.[1] Respondent believes that the New Mexico Court of Appeals correctly determined that state sovereign immunity does not bar suit based upon a federal statute. The central issue of this case, of course, is before the United States Supreme Court in *Alden v. Maine* (No. 98-436). This same issue is also the subject of a petition for writ of certiorari in *State of New Mexico Department of Public Safety v. Whittington* (No. 98-1110) (again originating out of New Mexico), as well as in a petition for a writ of certiorari in *Arkansas Dept. of Education v. Jacoby* (No. 98-04).

The various cases before this Court all involve the question of the interplay between Congress' Article I legislative power, state sovereign immunity, the Supremacy Clause of the United States Constitution, and the affect of this Court's decision in *Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996), on the Eleventh Amendment question.

As this Court has already heard oral argument in *Alden v. Maine*, it is likely that the central issue in this case will be quickly resolved. A finding that a state is not immune from liability under the Fair Labor Standards Act will be dispositive. The converse, however, is not true. There are

---

1. This is not to say that Respondent agrees with Petitioners' discussion of the law.

important differences between the issues in this case and the issues before the Court in *Alden*; even if this Court were to affirm the Supreme Court of Maine, and find that the State of Maine enjoys sovereign immunity from a Fair Labor Standards Act claim, a different result could obtain in this case for two reasons:

First, Maine apparently enjoys common law sovereign immunity. In sharp contrast, the Supreme Court of New Mexico found that common law sovereign immunity was archaic and feudalistic, and abolished it in *Hicks v. State*, 88 N.M. 588, 544 P.2d 1153 (1975). *Accord, Torrance County Mental Health Program, Inc. v. New Mexico Health & Environment Dept.*, 113 N.M. 593, 830 P.2d 145 (1992). The only sovereign immunity which New Mexico presently enjoys is a statutory sovereign immunity, enacted after the abolition of common law sovereign immunity, which is quite limited in scope.

Second, the courts in Maine have refused to entertain lawsuits against the state arising under the Fair Labor Standards Act. At issue is whether the federal government can force those courts to hear cases that it does not want to hear. In sharp contrast, the Court of Appeals of New Mexico has agreed that our courts can and will decide claims brought against the state under the Fair Labor Standards Act. *Whittington v. State of New Mexico Dept. of Public Safety*, 966 P.2d 188 (Ct. App.), *cert. denied* by the New Mexico Supreme Court, October 14, 1998; *cert. pending* to the United States Supreme Court. This is consistent both with the Supremacy Clause of the United States Constitution, and with the New Mexico Constitution:

> The State of New Mexico is an inseparable part of the federal union, and the Constitution of the United States is the supreme law of the land.

New Mexico Constitution, Art. II, § 1.

CONCLUSION

Should this Court rule that states cannot enjoy any form of sovereign immunity with regard to claims arising under the Fair Labor Standards Act, the decision in *Alden*, is dispositive. Should the Court, however, find that the State of Maine is immune from claims arising under the Fair Labor Standards Act, then by accepting the petition for writ of certiorari this Court can directly address the question whether a different result should obtain in New Mexico due to the fact that New Mexico has abolished common law sovereign immunity and the courts of New Mexico have agreed that they will take jurisdiction over Fair Labor Standards Act claims against the State of New Mexico.

Respectfully submitted,

MATTHEW HOLT
Counsel of Record
HOLT & BABINGTON, P.C.
Attorneys for Respondent
1600 Hickory Loop
Las Cruces, NM 88005
(505) 524-8812